IN THE

Supreme Court of Florida

Case No.: SC20-291
L.T. Case No.: 1D17-210

LINDA PRENTICE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN C. PRICE,

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Respondent.

AMICUS CURIAE BRIEF OF FLORIDA JUSTICE REFORM INSTITUTE

ON DISCRETIONARY REVIEW FROM
A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

William W. Large
Florida Bar No. 981273
FLORIDA JUSTICE REFORM INSTITUTE
210 S. Monroe St.
Tallahassee, Florida 32301
Telephone: (850) 222-0170
william@fljustice.org

Christine R. Davis
Florida Bar No. 569372
Joseph H. Lang, Jr.
Florida Bar No. 059404
CARLTON FIELDS, P.A.
215 S. Monroe St., Suite 500
Tallahassee, Florida 32301
Telephone: (850) 224-1585
Facsimile: (850) 222-0398
cdavis@carltonfields.com
jlang@carltonfields.com

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Counsel for Amicus Curiae Florida Justice Reform Institute

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Florida Justice Reform Institute ("Institute") is Florida's leading organization of concerned citizens, business owners and leaders, doctors, and lawyers who seek the adoption of fair legal practices to promote predictability and personal responsibility in the civil justice system. The Institute has advocated practices that build faith in Florida's court system and judiciary. It represents a broad range of participants in the business community who share a substantial interest in a litigation environment that treats plaintiffs and defendants evenhandedly.

The evenhanded application of traditional and well-settled preclusion doctrines promotes stability in the law and ensures that parties have their day in court. Yet, this Court's novel application of the doctrine of claim preclusion in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), has created instability by blurring the recognized lines of distinction between claim preclusion and issue preclusion. Specifically, by determining the "res judicata effect" of the *Engle* jury's Phase I findings, *see Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), under a rubric of claim preclusion rather than issue preclusion, this Court determined that defendants were foreclosed from litigating any theory that was or could have been decided by the *Engle* jury in the subsequent progeny cases. That allows plaintiffs to benefit from the heretofore unheard-of use of offensive claim preclusion without requiring a showing that any specific theory or issue was actually litigated and

decided by the *Engle* jury.

Any suggestion that the *Douglas* decision on claim preclusion can be dismissed as a one-off is shortsighted. When a long-settled doctrine is misapplied by the State's highest court, it incents and fosters creative attempts to further erode existing principles. That is a critical threat to the Institute's members.

Maintaining the fundamental right to fairly defend against lawsuits is a primary interest of the Institute's members. By relieving plaintiffs of their burden to prove all elements of their claims, this Court's decision in *Douglas* threatens defendants' rights to have their day in court and fully defend against all elements of claims brought against them. Indeed, the threat of the unprecedented application of offensive claim preclusion in the class context would be staggering to defendants. For those reasons, the specter of increased liability exposure resulting from this radical expansion of claim preclusion prompts the Institute to urge this Court to reconsider its preclusion ruling in *Douglas*.

SUMMARY OF ARGUMENT

This Court's decisions in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), and *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), have created upheaval in Florida's long-settled preclusion doctrines.

In *Engle*, this Court held, by a bare 4-3 margin, that the *Engle* jury's Phase I findings would be given "res judicata effect" in *Engle* progeny cases. In doing so,

the Court did not specify or analyze whether it intended to invoke claim preclusion principles or issue preclusion principles. Given that claim preclusion requires a final judgment on the merits and is a defensive doctrine that acts as a bar to future litigation of entire claims and defenses, however, issue preclusion is the only doctrine that would have potentially fit the facts and procedural posture of the subsequent progeny cases.

Notwithstanding, this Court in *Douglas* departed from the traditional contours of claim preclusion and applied a transformed semblance of that doctrine to foreclose the litigation in *Engle* progeny cases of any theory that was or could have been decided by the *Engle* Phase I jury. That is, claim preclusion was applied offensively to relieve plaintiffs in *Engle* progeny cases from the obligation to show that any specific theory or issue was actually litigated and decided by the *Engle* Phase I jury. In turn, defendants were barred from litigating claims and issues that were not clearly decided against them in *Engle*.

The generic term "*res judicata*," of course, captures both claim preclusion and issue preclusion. So, when this Court in *Douglas* confronted the issue of applying "res judicata effect" to the *Engle* jury's Phase I findings, it could have chosen to apply the more apt issue preclusion doctrine. Had it done so, it necessarily would have had to conclude that the *Engle* jury's Phase I findings could not satisfy the longstanding requirement that specific issues must be actually litigated and decided

in a prior action in order for issue preclusion to apply. *See Douglas*, 110 So. 3d at 433 ("[T]o decide here that we really meant issue preclusion even though we said res judicata in *Engle* would effectively make the Phase I findings regarding the *Engle* defendants' conduct useless in individual actions."). That is, the well-settled test for issue preclusion could not be satisfied because it was not possible to determine which particular issues were actually decided—and which theories were adopted—by the *Engle* jury in reaching its general verdict.

Thus, in an expedient decision meant to breathe life into the *Engle* jury's Phase I efforts, the *Douglas* Court contorted the inapt claim preclusion doctrine to meet the task. That decision, unfortunately, has now introduced great uncertainty into the previously predictable and evenhanded field of preclusion law in Florida. It has introduced the idea of the offensive use of claim preclusion, in the absence of a final judgment on the merits, into Florida's jurisprudence. This is dangerous to all defendants, but poses particular risks in class action litigation.

It is not too late to address this problem. Although a healthy respect for prior precedent is a commendable feature of our legal system, this Court has recognized that "blind allegiance" that would "perpetuat[e] an error in legal thinking" is not a worthy goal. *State v. Poole*, 297 So. 3d 487, 506 (Fla. 2020). This Court has not hesitated to revisit earlier and wrongly-decided decisions.

There are no reliance or expectation interests to sufficiently countervail the

need to fix this aberration. *Engle* progeny plaintiffs pursue common law claims with well-known elements. When they filed their lawsuits in the wake of *Engle*, there was no reason to assume any given procedure for the progeny trials and every reason to assume that traditional preclusion law would be faithfully applied in carrying out this Court's *Engle* decision. Nothing written by this Court in *Engle* indicated that its generic use of the term "*res judicata*" would lead to the transformation, years later, of Florida's claim preclusion principles in *Douglas*. Indeed, reliance interests are at their lowest in matters relating to the procedure and rules for the conduct of individual trials. The net effect of this Court's reconsidering its *Douglas* decision would not be to alter the elements of *Engle* progeny plaintiffs' common law causes of action. Instead, it simply would be to make them bear the burden of proving all common law elements of their claims, as other plaintiffs must.

This Court has long confirmed its elevation of correct results and true justice over expediency in its own Seal: "Sat Cito Si Recte."

ARGUMENT

I. The Court Should Reconsider *Engle* and *Douglas*.

This case is just the latest *Engle* progeny case to reach this Court. Like several that came before it, it too reaches the Court on an issue that arises because progeny cases tend to inspire the lower courts to develop *Engle*-only doctrines outside the traditional common law. *See, e.g., R.J. Reynolds Tobacco Co. v. Allen*, 228 So. 3d

684, 689 (Fla. 1st DCA 2019) ("*Engle*-progeny cases are different.").

The idea of a different set of rules for one class of defendant is concerning, but the slew of *Engle*-specific issues faced by the courts of this state are really only the symptom, not the cause. The underlying cause is one that troubles the Institute and its members: This Court's decisions in *Engle* and *Douglas* upended age-old preclusion doctrines in Florida, spawning a flurry of follow-on litigation and creating a risk for any defendant of being faced with mass litigation wherein it might be deprived of its day in court with respect to essential elements of plaintiff's claims. This Court should take this occasion to reconsider *Engle* and *Douglas* and reset the law of preclusion in Florida to its original and traditional function.

In *Engle*, this Court announced a so-called "pragmatic solution," *Engle*, 945 So. 2d at 1269, to retain some work of the *Engle* jury after decertifying the class. The Court resolved to retain most of the jury's Phase I findings and stated that "[c]lass members can choose to initiate damages actions and the Phase I common core findings we approved will have res judicata effect in those trials." *Id*. at 1269. This Court did not explain what "res judicata effect" it anticipated, nor did it suggest that trial courts should deviate from Florida's traditional common law preclusion principles. Indeed, Chief Justice Canady later observed that the *Engle* Court "employed no analysis" in announcing that *res judicata* would apply. *See Douglas*, 110 So. 3d at 438 (Canady, J., dissenting).

By the time *Douglas* reached this Court, more than six years after *Engle*, the question could no longer be avoided. Faced with thousands of *Engle*-progeny cases crowding the lower-court dockets, this Court had to identify the legal effect of the *Engle* Court's statement that the *Engle* jury's Phase I findings were to be given "res judicata effect." Given the posture of the case and the nature of the *Engle* jury's Phase I findings, that inquiry should have been guided by the rubric of traditional issue preclusion. That doctrine requires that the issues on which preclusion is sought were "actually litigated **and decided**" in the prior case. *Gordon v. Gordon*, 59 So. 2d 40, 45 (Fla. 1952) (emphasis added). That is, the court enforcing preclusion must find that "**the precise facts**" on which preclusion is sought "were determined by the former judgment" and "a critical and necessary part of the prior determination." *Bagwell v. Bagwell,* 14 So. 2d 841, 843 (Fla. 1943) (per curiam) (emphasis added).

The *Douglas* Court acknowledged, however, that because the *Engle* jury "did not make detailed findings for which evidence it relied upon," the *Engle* jury's Phase I findings would be "useless in individual actions" if analyzed under an issue preclusion rubric. *Douglas*, 110 So. 3d at 433. So, to salvage the *Engle* Court's determination that "res judicata effect" should be given to the *Engle* jury's Phase I findings, the *Douglas* Court embraced a novel form of claim preclusion. That decision to adopt claim preclusion, a traditional affirmative defense, for offensive use and, in doing so, to dispense with the "actually decided" requirement found in

issue preclusion doctrine, is deeply flawed.

In a thorough analysis of the *Engle* and *Douglas* decisions, Judge Tjoflat looked askance on this Court's path of reasoning: "That [the *Engle* Court's] dicta regarding the res judicata effect of the Phase I findings could so drastically alter the Phase I findings and Florida's preclusion doctrines and tort law is startling." *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1214 (11th Cir. 2017) (*en banc*) (Tjoflat, J., dissenting).

To be sure, this Court in *Engle* stated that the *Engle* Phase I jury "did not determine whether the defendants were liable to anyone." *Engle*, 945 So. 2d at 1263 (quoting *Liggett Grp., Inc. v. Engle,* 853 So. 2d 434, 450 (Fla. 3d DCA 2003)). The *Engle* Court also characterized the *Engle* Phase I jury's work as arriving at "factual findings," not liability determinations. *Engle*, 945 So. 2d at 1269. But in framing the *res judicata* issue as being one of claim preclusion rather than issue preclusion, the *Douglas* Court had to jettison those premises. Judge Tjoflat viewed that shifting ground skeptically:

> Thus, to the *Douglas* [] Court, *Engle* [] was nothing but a code. Where *Engle* [] says "no final judgment," it means "final judgment." Where *Engle* [] says "res judicata to factual findings," it means "res judicata to causes of action litigated to completion." Where *Engle* [] holds that "legal causation would be **litigated** in progeny trials," it means "legal causation would be **presumed** in progeny trials."

Graham, 857 F.3d at 1267 (Tjoflat, J., dissenting) (emphasis in original).

Rather than joining in those strained efforts to justify the invocation of claim preclusion, Chief Justice Canady recognized that *res judicata* is a term that encompasses both claim preclusion and issue preclusion and suggested that "[i]t is much more reasonable to conclude that the *Engle* Court employed the term res judicata in its broader, modern sense than to conclude that the Court dispensed with a fundamental prerequisite for the application of claim preclusion—a final judgment on the merits—and did so without offering any explanation or justification." *Douglas*, 110 So. 3d at 439 (Canady, J., dissenting).

The consequence of the *Douglas* Court's analysis is that the line between two important and distinct preclusion doctrines in Florida has been blurred. To invoke claim preclusion, a defendant must prove that the plaintiff's cause of action was adjudicated on the merits in a previous case involving the same parties. *See Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001).

Simply put, claim preclusion applies where a claim merges into a final judgment on the merits and completely bars further litigation on that claim. Claim preclusion, unlike issue preclusion, encompasses any issue that could have been litigated in a prior action, whether or not it was actually litigated and decided. If a claim presented in subsequent litigation is one that was or could have been decided in the prior litigation, re-litigation of the claim is barred regardless of the basis of the prior judgment on the merits.

Issue preclusion, on the other hand, requires that the issue sought to be precluded in later litigation (in the same case or a distinct case) must have been actually litigated and decided in the original litigation. For issue preclusion to apply, there must be (1) identical parties, (2) identical issue(s), (3) full litigation of the particular matter, (4) determination of the particular matter, and (5) a "final decision" in the prior proceeding by a court of competent jurisdiction. *Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co.*, 945 So. 2d 1216, 1235 (Fla. 2006) (quoting *Dep't of Health & Rehab. Servs. v. B.J.M.*, 656 So. 2d 906, 910 (Fla. 1995)).

The requirement that an issue must be actually litigated and decided in the previous litigation

> originated with early English authorities, which explained that preclusion requires a determination "directly upon point"; recognizing courts could not preclude parties from litigating issues on the basis that such issues **might have been** or **probably were** decided. *The Duchess of Kingston's Case*, 20 Howell's State Trials 538 (House of Lords 1776). Rather, courts could estop litigation only when the "estoppell" was "certaine to every intent, and not . . . taken by argument or inference." 2 Coke, *The First Part of the Institutes of the Laws of England; Or, A Commentary on Littleton* ¶ 352a (1817).

Graham, 857 F.3d at 1215 (Tjoflat, J., dissenting) (emphasis in original).

Unlike claim preclusion, which was widely recognized as being solely a defensive doctrine before this Court's decision in *Douglas*, issue preclusion, when applicable, can be asserted offensively or defensively. These same common-law

preclusion principles recur throughout American jurisprudence across jurisdictions, including Florida. Indeed, this was the state of the law in Florida when the *Engle* Court adopted its "pragmatic solution" of giving "res judicata effect" to the *Engle* jury's Phase I findings. *See Topps v. State*, 865 So. 2d 1253, 1254-55 (Fla. 2004) (claim preclusion "bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised"); *City of Oldsmar v. State*, 790 So. 2d 1042, 1046 n.4 (Fla. 2001) (issue preclusion applies when the "'identical issue has been litigated between the same parties or their privies,' [and] determined in a contest that results in a final decision." (quoting *Gentile v. Bauder*, 718 So. 2d 781, 783 (Fla. 1998))).

Engle and *Douglas* departed from this longstanding Florida preclusion law. With that departure, this Court introduced great uncertainty into the previously-settled applications of these two common-law doctrines and undermined the due process promise that "'everyone should have his own day in court,'" *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996)).

At this point, it bears acknowledging that there exists a natural temptation to view the *Douglas* Court's distortion of claim preclusion as an *Engle*-only problem and to treat the Court's *Douglas* decision as a *sui generis* or one-off resolution. That temptation should be strongly resisted. In fact, this Court's misapplication of claim

preclusion in *Douglas* cannot be easily cabined—at least not in any principled way. Because this Court addressed traditional claim preclusion and issue preclusion in *Douglas*, the Court's precedent will inform any research on both doctrines in Florida going forward. Indeed, it is not difficult to find the Court's analysis already cited outside the confines of the *Engle* progeny universe. *See Mosaic Fertilizer, LLC v. Curd*, 259 So. 3d 239, 245 (Fla. 2d DCA 2018) (confronting whether "*Engle* authorized the circuit court to use rule 1.220(d)(4)(A) to certify classwide liability issues"); *U.S. Bank Nat'l Ass'n v. Amaya*, 254 So. 3d 579, 582 (Fla. 3d DCA 2018) (citing *Engle* and *Douglas* when setting forth the "[t]he foundation of res judicata").

The risks posed by this Court's offensive application of claim preclusion in *Douglas* are particularly pronounced in the context of class actions. Although the risk of unfairness is real, courts have allowed issues to be decided in a class proceeding with issue preclusion principles carrying those jury findings forward to individual damages actions by class members. *See Douglas*, 110 So. 3d at 437 (Canady, J., dissenting) ("I do not dispute the point 'that a defendant's common liability may be established through a class action and given binding effect in subsequent individual damages actions.'") (quoting majority opinion). But, in those situations, the protections of traditional issue preclusion are applied to ensure that the issues subject to offensive preclusion were actually litigated and decided.

In *Douglas*, however, those protections were abandoned as the Court allowed

the offensive use of claim preclusion, rather than issue preclusion, in the class context. *See Douglas*, 110 So. 3d at 437 (Canady, J., dissenting) ("But I do dispute the view that the doctrine of claim preclusion should be applied in support of the conclusion that the *Engle* Phase I findings were necessarily sufficient to establish the common liability of the defendants here.").

The impact of the unfettered and unprecedented application of offensive claim preclusion in the class context would be staggering to defendants. For example, in the post-*Douglas* world, one can imagine a class action alleging multiple tortious practices, policy violations, or defects being tried as an issues class with individual damages trials to follow. If offensive claim preclusion is applied to that trial plan, the defendant would face not only (the already daunting) classwide damages exposure for any tortious practice, policy violation, or defect actually found and decided by the jury, but also for any that the jury could have found. That is, as long as the evidence is sufficient to support the jury's finding on any one practice, policy, or defect theory of liability, the defendant in subsequent litigation could be foreclosed from contesting liability for **all** such practices, policies, or defect theories of liability that could have been found, without any assurance which, if any, of those issues was actually decided by the jury. Indeed, a single generalized jury verdict could be catastrophic for a defendant.

The incentive to litigate inevitably increases when plaintiffs can utilize

offensive claim preclusion in this way. By relieving plaintiffs of the burden to prove all elements of their claims, *Douglas*'s novel approach to claim preclusion decreases the cost and risk of litigation they face. A corollary to that reality, of course, is that defendants in turn face ever-increasing pressure to settle such class actions because of unbounded economic exposure. Another corollary is that Florida is at risk of becoming a hotbed for such class action litigation because of this favorable (to plaintiffs) law of preclusion—and businesses operating in Florida face losses due to an overwhelming pressure to settle cases (including those for which they have a meritorious defense) because the risk of liability is too great to chance.

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This Court's application of claim preclusion in *Douglas* is far afield from the doctrine's origins. Although the doctrine was historically (and uniformly) an affirmative defense that was not subject to an offensive invocation, this Court's application of claim preclusion in an offensive manner and in the absence of a final judgment on the merits has unsettled the law and invited trouble in future cases. The Institute urges the Court to reconsider its *Engle* and *Douglas* decisions and to reaffirm the traditional contours of claim preclusion and issue preclusion in Florida.

II. *Stare Decisis* Principles Favor the Reconsideration of *Engle* and *Douglas*.

This Court has not hesitated to reconsider and recede from prior precedent when "blind allegiance" would "perpetuat[e] an error in legal thinking."

> *Stare decisis* provides stability to the law and to the society governed by that law. Yet *stare decisis* does not command blind allegiance to precedent. "Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court."

State v. Poole, 297 So. 3d 487, 506 (Fla. 2020) (quoting *Shepard v. State*, 259 So. 3d 701, 707 (Fla. 2018) & *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995)); *see Lawrence v. State*, No. SC18-2061, 2020 WL 6325895 (Fla. Oct. 29, 2020); *Phillips v. State*, 299 So. 3d 1013, 1023 (Fla. 2020); *Bush v. State*, 295 So. 3d 179 (Fla. 2020).

Justice Thomas has explained that courts should reconsider a precedent that does harm, as here, to an older, established rule:

> The founding generation recognized that a "judge may **mistake** the law." And according to Blackstone, judges **should** disregard precedent that articulates a rule incorrectly when necessary "to vindicate the old [rule] from misrepresentation." He went further: When a "former decision is manifestly absurd or unjust" or fails to conform to reason, it is not simply "bad law," but "not law" at all.
>
> Thus, the founding generation understood that an important function of the Judiciary in a common-law system was to ascertain what reason or custom required; that it was possible for courts to err in doing so; and that it

> was the Judiciary's responsibility to "examin[e] without fear, and revis[e] without reluctance," any "hasty and crude decisions" rather than leaving "the character of [the] law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."

*Gamble v. United State*s, 139 S. Ct. 1960, 1983-84 (2019) (Thomas, J., concurring) (emphasis in original) (quoting 1 W. Blackstone, Commentaries on the Laws of England (1765) & 1 J. Kent, Commentaries on American Law (1826) (internal citations omitted)).

These principles espoused by Justice Thomas are not of recent vintage. Justice Frankfurter set forth a similar view regarding the need to fix errors that collide with "more embracing" prior doctrines:

> Many people have the notion that following precedent (sometimes called the doctrine of *stare decisis*) is an ironclad rule. It is not, and never has been. As Justice Felix Frankfurter once explained, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

Robert Bork, *The Tempting of America: The Political Seduction of the Law* 155-56 (1990) (quoting *Helvering v. Haddock*, 309 U.S. 106, 119 (1940)).

This reasoning is also consistent with other recent decisions from the Supreme Court that reconsidered and overruled prior precedent. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019) (overruling a decision that "was not just wrong," but

also contained "reasoning [that] was exceptionally ill founded and conflicted with much of [the Court's] takings jurisprudence"); *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2479 (2018) (overruling a decision that "went wrong at the start").

Because *Engle* and *Douglas* have had the effect of leaving the contours of once-settled preclusion doctrines in a muddle, *stare decisis* principles counsel in favor of reconsidering those decisions and receding from this Court's singular treatment of those preclusion doctrines in those cases. *Engle* and *Douglas* should not have served "as an occasion to disregard decades of settled Supreme Court and Florida precedent." *Poole*, 297 So. 3d at 506.

This Court has stated that it is "wary of any invocation of multi-factor *stare decisis* tests or frameworks" and that "[m]ulti-factor tests or frameworks . . . often serve as little more than a toolbox of excuses to justify a court's unwillingness to examine a precedent's correctness on the merits." *Poole*, 297 So. 3d at 507. Indeed, this Court emphasized that, "once we have chosen to reassess a precedent and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason **why not** to recede from that precedent." *Id.* (emphasis in original). On that question, the Court says "[t]he critical consideration ordinarily will be reliance." *Id.* "It is generally accepted that reliance interests are 'at their acme in cases involving property and contract rights' [a]nd reliance interests are lowest in

cases . . . 'involving procedural and evidentiary rules.'" *Id.* (internal citation omitted).

Reliance interests do not exist here that could possibly justify the maintenance of a contorted law of preclusion. In the wake of the *Engle* decision, plaintiffs filing progeny lawsuits in the one-year window set up by the Court could not reasonably have relied upon the idea, or even predicted, that this Court in *Douglas* would apply claim preclusion to animate the *Engle* jury's findings. Rather, there was every reason for these plaintiffs to believe that Florida's preclusion doctrines would be applied by the courts as they had long existed.

The *Douglas* Court's decision, coming years after all *Engle* progeny cases had been originally filed, impacted the way future progeny cases would be tried, as would a reconsideration of "procedural or evidentiary rules." *Cf. Poole*, 397 So. 3d at 507. This is where "reliance interests are lowest." *Id.*; *see Ramos v. Louisiana*, 140 S. Ct. 1390, 1406 (2020) ("When it comes to reliance interests, it's notable that neither [party] claims anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke. No one, it seems, has signed a contract, entered a marriage, purchased a home, or opened a business based on the expectation that" the existing precedent would endure).

It bears emphasis that reconsidering the preclusion rulings in *Engle* and *Douglas* would result only in requiring *Engle* progeny plaintiffs to prove the

traditional elements of their common law claims, exactly as plaintiffs in the non-*Engle* universe must do on a daily basis, no more and no less. No cause of action would be retroactively abolished nor would any traditional elements of the common law causes of action be altered. *Cf. Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 133 (Fla. 2011) ("Retroactive application of the Act here would operate to completely abolish the Appellees' vested rights in accrued causes of action for asbestos-related injury. For this reason, we conclude that the Act cannot be constitutionally applied to them."). Simply put, it is not plausible to suggest that *Engle* progeny plaintiffs chose to file their lawsuits, against the backdrop of long-existing preclusion law in Florida, with the reasonable expectation of this Court's ruling in *Douglas* years later.

Thus, reliance or expectation interests do not counsel against reconsideration of the *Engle* and *Douglas* preclusion rulings in this case. Although *Engle* progeny plaintiffs may be disappointed with such a result, they could not reasonably have guided their conduct in 2007 (when the window was open for filing *Engle* progeny suits) based upon this Court's unprecedented preclusion ruling in *Douglas* in 2013.

So, while "[c]ourts are particularly deferential to horizontal precedent in the field of commercial law, in which the 'prior precedent is more likely to have guided numerous people in their conduct,'" that is not at play here. Bryan A. Garner *et al.*, *The Law of Judicial Precedent* 409 (2016). Rather, in this context, the only

reliance is that of plaintiffs on a rule governing in-court litigation that would allow them to recover damages without having to prove all of the elements of their claims. And, reliance on an unfair advantage that violates the rights of one's opponents is no valid reliance interest at all.

CONCLUSION

The Court should reconsider and recede from its claim preclusion ruling in *Douglas* and instead apply a traditional issue preclusion analysis in evaluating the "res judicata effect" to be accorded to the *Engle* jury's Phase I findings.

December 10, 2020.

Respectfully submitted,

/s/*Christine R. Davis*

Christine R. Davis
Florida Bar No. 569372
Joseph H. Lang
Florida Bar No. 059404
CARLTON FIELDS, P.A.
215 S. Monroe St., Suite 500
Tallahassee, Florida 32301
Telephone: (850) 224-1585
Facsimile: (850) 222-0398
cdavis@carltonfields.com
jlang@carltonfields.com
sdouglas@carltonfields.com
kathompson@carltonfields.com
tpaecf@cfdom.net

William W. Large
Florida Bar No. 981273
FLORIDA JUSTICE REFORM INSTITUTE
210 S. Monroe St.
Tallahassee, Florida 32301
Telephone: (850) 222-0170
william@fljustice.org

Counsel for Amicus Curiae Florida Justice Reform Institute

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *amicus curiae* brief was filed with the Clerk of Court and served via Florida Courts ePortal email on the following this 10th day of December, 2020.

Gregory D. Prysock, Esq.
Katherine Massa, Esq.
MORGAN &MORGAN, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
gprysock@forthepeople.com
kmassa@forthepeople.com
jillj@forthepeople.com

Keith R. Mitnik, Esq.
MORGAN &MORGAN, P.A.
P.O. Box 7979
Orlando, FL 32808
kmitnik@forthepeople.com
marnold@forthepeople.com

Celene Humphries, Esq.
Thomas J. Seider, Esq.
BRANNOCK & HUMPHRIES
1111 West Cass Street, Suite 200
Tampa, FL 33606
chumphries@bhappeals.com
tseider@bhappeals.com
tobacco@bhappeals.com

Attorneys for Petitioner

Troy A. Fuhrman, Esq.
Marie A. Borland, Esq.
HILL WARD HENDERSON
101 East Kennedy Boulevard, Suite 3700
Tampa, FL 33601
troy.fuhrman@hwhlaw.com
marie.borland@hwhlaw.com

Charles R.A. Morse, Esq.
JONES DAY
250 Vesey Street
New York, NY 10281-1047
cramorse@jonesday.com

Jason T. Burnette, Esq.
JONES DAY
1420 Peachtree Street, N.E., Suite 800
Atlanta, GA 30309-3053
jtburnette@jonesday.com

Attorneys for Respondent

/s/*Christine R. Davis*
Christine R. Davis
Florida Bar No. 569372

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for *amicus curiae* hereby certifies that the foregoing amicus brief complies with the applicable font requirement because it is written in 14-point Times New Roman font.

December 10, 2020

/s/*Christine R. Davis*
Christine R. Davis
Florida Bar No. 569372